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ALLIED ERECTING AND DISMANTLING, INC. and ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,	:	
	:	STB Docket No. FD 35316
Petitioners,	:	
v.	:	
OHIO CENTRAL RAILROAD, INC., OHIO & PENNSYLVANIA RAILROAD COMPANY, THE WARREN & TRUMBULL RAILROAD COMPANY, YOUNGSTOWN & AUSTINTOWN RAILROAD, INC., THE YOUNGSTOWN BELT RAILROAD COMPANY, THE MAHONING VALLEY RAILWAY COMPANY, and SUMMIT VIEW, INC., collectively d/b/a The Ohio Central Railroad System, and GENESEE & WYOMING, INC.,	:	
Respondents.	:	

MOTION TO FILE SECOND SUPPLEMENT TO PETITION FOR DECLARATORY ORDER

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BEFORE THE SURFACE TRANSPORTATION BOARD
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20423

ALLIED ERECTING AND DISMANTLING, INC. and ALLIED INDUSTRIAL DEVELOPMENT CORPORATION,	:	
	:	STB Docket No. F.D. 35316
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Respondents.	:	

MOTION TO FILE SECOND SUPPLEMENT TO PETITION FOR DECLARATORY ORDER

Petitioners, Allied Erecting & Dismantling, Inc. and Allied Industrial Development Corporation (collectively "Allied"), by their attorneys, file this Motion to File Second Supplement to Petition For Declaratory Order in order to introduce (i) Opinion & Order of James S. Gwin, United States District Judge, Northern District of Ohio, in Case No. 4:09-CV-1904, *Allied Industrial Development Corporation v. Ohio Central Railroad, Inc., et al.*, dated March 15, 2010, and (ii). Opinion & Order of James

S. Gwin, United States District Judge, Northern District of Ohio, in Case No. 4:09-CV-1904, *Allied Industrial Development Corporation v. Ohio Central Railroad, Inc., et al.*, dated April 15, 2010. That case involves the same parties that are the subject of the above-captioned matter. Moreover, it involves part of the same underlying factual controversy that is involved in the instant proceeding.

Significantly, Judge Gwin stated that "neither of Allied Industrial's claims comes within the scope of the ICCTA's preemption clause. That clause's central concern is 'regulation of rail transportation' – not the incidental effect on rail transportation caused by a landowner's right to exclude others from its property." (See March 15 Order.)

By its March 15 Order, the Court remanded the case to the Mahoning County Court of Common Pleas upon finding that it lacked jurisdiction over Allied's unlawful trespass and forcible entry and detainer/ejectment claims that arose under Ohio statutory and common law. The Court also rejected the defendants' request that it refer the matter to the Board upon finding that Allied's claims are not completely preempted by the ICC Termination Act.

By its April 15 Order, the Court denied reconsideration and awarded Allied attorneys' fees. Copies of the Orders are attached hereto for the Board's consideration.

Respectfully submitted,

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Dated: April 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Second Supplemental Petition for Declaratory Order was served upon the following counsel by first class United States mail, this 16th day of April, 2009.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ALLIED INDUSTRIAL DEVELOPMENT CORPORATION, Plaintiff, v. OHIO CENTRAL RAILROAD, INC., *et al.*, Defendants.	CASE NO. 4:09-CV-01904 OPINION & ORDER [Resolving Doc. Nos. 50, 62 & 65.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

In this trespass action, the defendant railroad companies removed the case to federal court and now move to dismiss the case for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). [Doc. 1; Doc. 50.] In the alternative, the defendants ask the Court to refer certain issues in the case to the Surface Transportation Board. [Doc. 50.] The plaintiff opposes the defendants' motion. [Doc. 62.] For the reasons that follow, the Court REMANDS this case to the Mahoning County Court of Common Pleas.

I.

In its complaint, plaintiff Allied Industrial Development Corp. alleges that it purchased two parcels of property in Youngstown from third-party defendant Gearmar Properties, Inc., who had previously purchased the parcels from defendants The Ohio & Pennsylvania Railroad Company and The Mahoning Valley Railway Company. [Doc. 1-1.] Allied Industrial alleges that, without its

consent, the defendants currently occupy an office building on one of the parcels and are using the other parcel for storage. [Doc. 1-1.] Allied Industrial has asked the defendants to vacate the parcels, but the defendants remain on the land. [Doc. 1-1.]

As a result, Allied Industrial filed this state-law action in the Mahoning County Court of Common Pleas. [Doc. 1-1.] Allied Industrial's complaint seeks (1) forcible entry and detainer/ejectment under Ohio statutory and common law; (2) the fair rental value of the parcels during the defendants' unlawful trespass; and (3) damages caused by the defendants during their unlawful trespass. [Doc. 1-1.]

In response, the defendants removed the case to this Court on the basis of federal question jurisdiction. [Doc. 1.] *See* 28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."); 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The defendants' removal notice states that because Allied Industrial's requested relief would force them to abandon service over the rail lines on the parcels in question, and because the Interstate Commerce Commission Termination Act ("ICCTA") explicitly preempts state law regulating rail transportation, this action "aris[es] under" federal law. [Doc. 1 at ¶ 7. (citing 49 U.S.C. § 10501(b) ("[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.")).]

The defendants now move to dismiss this action for lack of jurisdiction on the ground that the ICCTA vests exclusive jurisdiction in the Surface Transportation Board. [Doc. 50 at 5-15 (citing

49 U.S.C. § 10501(b) ("The jurisdiction of the [Surface Transportation] Board over . . . [the] operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities . . . is exclusive.")).] In the alternative, the defendants ask the Court to refer the ICCTA issues in this case to the Surface Transportation Board. [Doc. 50 at 16-18.]

II.

A fundamental principle of federal procedure is that federal courts have limited subject-matter jurisdiction and are powerless to decide cases beyond that limited jurisdiction. Consequently, as the Supreme Court has explained:

> "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." . . . The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception."

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1997) (internal citations omitted).

Because federal jurisdiction is a "threshold matter," *id.* at 94, federal courts must raise the jurisdictional issue *sua sponte* whenever their lack of jurisdiction becomes apparent. *See, e.g.*, *Mansfield C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Further, a court of appeals must vacate any federal district court judgment entered absent jurisdiction and dismiss the action. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 154 (1908). With these principles in mind, the Court turns to whether it has jurisdiction over any part of this case.

Under the "well-pleaded complaint" rule, an action "aris[es] under" federal law—conferring

federal jurisdiction under 28 U.S.C. § 1331—"only when the plaintiff's statement of his own cause of action shows that it is based upon" federal law. *Mottley*, 211 U.S. at 152. Here, Allied Industrial, master of its complaint, named only state-law claims: forcible entry and detainer under Ohio Rev. Code Ann. §§ 1923.01 *et seq.* and trespass under Ohio common law. [Doc. 1-1.]

The defendants' notice of removal contends that because the ICCTA preempts Allied Industrial's claims, this Court has jurisdiction under § 1331. [Doc. 1.] But preemption is generally a defense, and the interposition of a federal-law defense against a state-law claim is insufficient to confer federal jurisdiction. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983) ("[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.").

Nor does the "complete preemption" exception to the well-pleaded complaint rule apply here. Under that exception, if "the pre-emptive force of a [federal] statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule,'" then "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (noting that § 301 of Labor Management Relations Act completely preempts state claims for violation of collective bargaining agreements). *See also* 13D Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Richard D. Freer, *Federal Practice & Procedure* § 3566 (3d ed. 2008) ("[The doctrine of "complete preemption"] is based on the theory that some federal statutes have such an overwhelming preemptive effect that they do more than merely provide a defense to a state-law claim. Rather, they take over an entire substantive subject matter area, supplant state law, and make the area inherently federal. Any claim asserted in that

substantive area—even a claim ostensibly based upon state law—is thus federal and the claim necessarily arises under federal law and invokes federal question jurisdiction.") (footnote omitted).

In this case, the "complete preemption" exception does not apply because neither of Allied Industrial's claims comes within the scope of the ICCTA's preemption clause. That clause's central concern is "*regulation* of rail transportation"—not the incidental effect on rail transportation caused by a landowner's right to exclude others from its property. 49 U.S.C. § 10501(b) (emphasis added). As the Sixth Circuit has explained, the ICCTA "preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'" *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (citation omitted) (holding, in context of conflict preemption, that ICCTA does not preempt state statutes requiring railroads to pay for maintenance of pedestrian sidewalks); *see also PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (Wilkinson, J.) (holding, in context of express and conflict preemption, that ICCTA does not preempt state contract claims that may affect railroad operations).

Moreover, the Surface Transportation Board's own interpretation of the ICCTA preemption clause reinforces the limited nature of the ICCTA's complete preemptive reach. That clause recognizes only two categories of categorically preempted state actions: (1) "any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized," and (2) "state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisition, and other forms of consolidation; and railroad rates and service." *CSX Transp., Inc.*, STB Finance Docket No. 34662,

2005 WL 1024490, at *2 (May 3, 2005).

Here, Allied Industrial's Ohio law claims cannot be said to "regulate" the abandonment of rail lines. It is true that the upshot of Allied Industrial's claims (if successful) might affect certain of the defendants' rail lines. But the cause of that outcome is not Ohio's direct regulation of the defendants' rail lines; rather, the cause is the defendants' sale of the two parcels at issue to Gearmar. *Cf.* *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321, 334 (5th Cir. 2008) ("The fatal defect in the Railroad's argument is that the Railroad fails to establish that any unreasonable interference with railroad operations is caused by operation or application of the Louisiana state law as opposed to the independent actions of private parties."); *PCS Phosphate Co.*, 559 F.3d at 218 ("Voluntary agreements between private parties . . . are not presumptively regulatory acts, and we are doubtful that most private contracts constitute the sort of 'regulation' expressly preempted by the statute. If contracts were by definition 'regulation,' then enforcement of every contract with 'rail transportation' as its subject would be preempted as a state law remedy 'with respect to regulation of rail transportation.'") (footnote omitted). Thus, the "complete preemption" exception does not apply in this case.

Because the ICCTA does not completely preempt Allied Industrial's state claims for purposes of the well-pleaded complaint rule, this case does not "aris[e] under" federal law. 28 U.S.C. § 1331. Thus, the defendants' removal of this case under 28 U.S.C. § 1441 was improper, and the Court must remand the case to state court. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

To clarify, the conclusion that the ICCTA does not "completely preempt" Allied Industrial's state-law claims applies only to the jurisdictional question. *See* 13D Wright, Miller, Cooper & Freer

§ 3566 ("The name ['complete preemption'] is misleading and this doctrine should be contrasted with 'ordinary' or 'conflict' preemption, under which federal law provides a defense to a state-law claim. 'Complete preemption,' in contrast, is actually a doctrine of subject matter jurisdiction."). The Court does not resolve the separate issue of whether the ICCTA's preemption clause provides a defense to Allied Industrial's claims—an issue that the defendants are free to raise in the state court.

Finally, because the defendants' improper removal of this case has caused Allied Industrial to incur significant expenses, the Court orders that the defendants pay Allied Industrial's costs, including attorney's fees, incurred in defending against their 12(b)(1) motion. [Doc. 50.] *See* 28 U.S.C. § 1447(c) ("An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal"). However, this order does not include the costs Allied Industrial incurred in preparing its summary judgment motion because Allied Industrial can likely re-use much of that motion to move for summary judgment in the state court. [Doc. 54.]

III.

In sum, because this case does not "aris[e] under" federal law, the defendants' removal of the case was improper. As a result, the Court **REMANDS** the case to the Mahoning County Court of Common Pleas and **ORDERS** that the defendants pay Allied Industrial's actual expenses incurred

as a result of removal.

IT IS SO ORDERED.

Dated: March 15, 2010

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ALLIED INDUSTRIAL DEVELOPMENT CORPORATION, Plaintiff, v. OHIO CENTRAL RAILROAD, INC., *et al.*, Defendants.	CASE NO. 4:09-CV-01904 OPINION & ORDER [Resolving Doc. Nos. 82, 83, 88 & 89.]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

The defendant railroad companies in this trespass action move this Court to reconsider its award of attorney's fees that Plaintiff Allied Industrial Development Corporation incurred as a result of the defendants' improper removal of this case from state court. [Doc. 82; Doc. 79 (remand order).] Because the defendants' ground for removing this case was not objectively reasonable, the Court DENIES their reconsideration motion.

The case law interpreting 28 U.S.C. § 1447(c) entrusts the award of costs and attorney's fees to the district court's sound discretion. *See, e.g.*, *Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993). The Sixth Circuit has held that an award of costs under § 1447(c) does not require a finding that the removing party had an improper purpose. *Id.* at 240. Rather, the normal rule, according to the Supreme Court, is that district courts may award fees "when the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*,

546 U.S. 132, 141 (2005). Here, the defendants lacked an objectively reasonable basis for removal.

The defendants removed this case on the ground that it "ar[o]s[e] under" federal law because the Interstate Commerce Commission Termination Act explicitly preempts state laws regulating rail transportation—like Ohio trespass law, which could force the defendants to abandon rail service over the rail lines on the property in question. [Doc. 1 at ¶ 7. (citing 49 U.S.C. § 10501(b) ("[T]he remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.")).]

This ground for removal was not objectively reasonable because the "well-pleaded complaint rule" disallows removal on the basis of a federal-law defense—like preemption—to a state-law cause of action. *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983) ("[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption.").

The defendants pin their counterargument on the "complete preemption" exception to the well-pleaded complaint rule. [Doc. 82 at 3-8.] But that argument flounders because Ohio trespass law falls outside the ICCTA's preemptive scope, which covers only "*regulation* of rail transportation." 49 U.S.C. § 10501(b) (emphasis added). A law that merely has the *incidental effect* of rail line abandonment does not "regulat[e]" rail transportation.[1/] *Id.* Accordingly, courts have limited the scope of ICCTA preemption to "'state laws that may reasonably be said to have the effect

[1/] If the contrary were true, as the defendants argue, then the scope of ICCTA preemption would be staggering, sweeping away state contract, tort, and property law. Indeed, it is difficult to imagine a state law that could not, in some circumstance, incidentally cause rail line abandonment. *But cf. Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47 (1st Cir. 2008) (Boudin, J.) ("No one supposes that a railroad sued under state law for unpaid bills by a supplier of diesel fuel or ticket forms can remove the case based on complete preemption simply because the railroad is subject to the ICCTA.").

of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'" *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (citation omitted) (state tax for maintenance of public sidewalks); *see also, e.g.*, *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir. 2009) (Wilkinson, J.) (state contract law); *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321, 334 (5th Cir. 2008) (state law authorizing private railroad crossings); *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47 (1st Cir. 2008) (Boudin, J.) (state nuisance law).[2/]

In the alternative, the defendants argue that even if their basis for removal was not objectively unreasonable, a fee award is not appropriate because Allied Industrial did not seek remand in a

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[2/]Many of the cases cited by the defendants are distinguishable because—unlike here—the state laws in question specifically targeted rail transportation. *See, e.g.*, *State v. Ill. Cent. R.R. Co.*, 928 So.2d 60 (La. Ct. App. 2005) (holding, in context of conflict preemption, that ICCTA preempted state statute directly governing ownership of particular parcel containing railroad tracks); *Rawls v. Union Pac. R.R. Co.*, No. 09-CV-1037, 2010 WL 892115, at *1 (W.D. Ark. Mar. 9, 2010) (holding that ICCTA completely preempted state-law claims for "inadequate audible warnings; inadequate visual warnings; failure to exercise reasonable care in [defendant's] train operations; failure to inspect and repair unsafe crossing conditions; specific unsafe crossing conditions; failure to report unsafe crossing conditions; failure to work with state and local authorities to maintain proper signs, signals, and markings; and, failure to properly train, instruct and manage its employees with respect to its operating practices and rules"); *South Dakota ex rel. S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 929 (D.S.D. 2003) (holding that ICCTA completely preempted "state contract and tort law remedies arising out of contracts which were previously approved by the ICC and the STB pursuant to federal law").

In *PCI Transportation v. Fort Worth & Western Railroad Co.*, 418 F.3d 535 (5th Cir. 2005), the Fifth Circuit erroneously failed to analyze the complete preemption issue from the perspective of the plaintiff's cause of action—instead giving dispositive weight to the fact that the ICCTA's remedies are exclusive. *Id.* at 544-45. That analysis misses the point. Yes, the ICCTA's remedies are exclusive—but only within the domain of "regulation of rail transportation." 49 U.S.C. § 10501(b). Thus, the complete preemption inquiry must ask whether the state law on which the plaintiff's claim is based in fact "regulat[es] . . . rail transportation." *Id. See also Fayard*, 533 F.3d at 47 ("But even where a federal statute can completely preempt some state law claims, the question remains *which* claims are so preempted. . . . For complete preemption, the critical question is whether federal law provides an exclusive substitute federal cause of action that a federal court (or possibly a federal agency) can employ for the kind of claim or wrong at issue. Accordingly, we narrow our focus to the nuisance claims brought by the [plaintiffs].") (emphasis in original; footnote deleted).

Finally, the court in *Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003), concluded that the ICCTA preempts any state law claim that would have the effect of rail line abandonment. As explained above, that construction reads the scope of ICCTA's preemption clause too broadly.

timely manner. *See, e.g.*, *Martin*, 546 U.S. at 141 ("[A] plaintiff's delay in seeking remand . . . may affect the decision to award attorney's fees."). But the Court's remand order took this factor into account by awarding Allied Industrial only the "costs, including attorney's fees, incurred in defending against the[defendants'] 12(b)(1) motion." [Doc. 79 at 7.] The order expressly disallowed "the costs Allied Industrial incurred in preparing its summary judgment motion . . . ." [Doc. 79 at 7.] In other words, by limiting the fee award to the costs incurred against defending against the defendants' Rule 12(b)(1) motion, the Court's remand order did not award any fees attributable to Allied Industrial's failure to expeditiously seek remand.

Finally, the defendants argue that the fee award should not include Allied Industrial's costs of defending against their 12(b)(1) motion because they would have filed that motion—forcing Allied Industrial to defend against it—even if the case had remained in state court. As evidence, the defendants point to another case in state court between the same parties in which the defendants successfully moved the state court to refer certain issues to the Surface Transportation Board. [Doc. 50-1 at 6-12.] The flaw in this argument is that even if the defendants had made the same motion in state court, Allied Industrial might not have opposed the motion; after all, that court had already decided the issue against Allied Industrial. And even if Allied Industrial did oppose the motion, motion practice on the issue would likely be less comprehensive before that court than before this Court, which had not yet expressed an opinion on the 12(b)(1) issue.

Thus, because the defendants' ground for removing this case was not objectively reasonable, and because no "unusual circumstances warrant a departure from the [normal] rule," *Martin*, 546 U.S. at 141, the Court **DENIES** their reconsideration motion. [Doc. 82.] Further, the Court

Case No. 4:09-CV-01904
Gwin, J.

GRANTS Allied Industrial's motion for attorney's fees and costs in the amount of $16,035.50.[3/] [Doc. 83.]

IT IS SO ORDERED.

Dated: April 14, 2010

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

[3/]The defendants advance three additional arguments for why Allied Industrial's claimed fees are excessive. [Doc. 88 at 6.] All three fail.

First, the defendants claim that Richard Streeter's legal services were for STB jurisdiction issues. However, Streeter's time entry descriptions refer to federal jurisdiction and plausibly stem from defending against the defendants' Rule 12(b)(1) motion.

Second, the defendants argue that "there is no verification that Mr. Streeter's hourly rate is reasonable." [Doc. 88 at 6.] But they do not offer any ground for believing that Mr. Streeter's hourly rate is unreasonable.

Third, the defendants argue that Allied Industrial's opposition to their reconsideration motion was untimely, and thus Allied Industrial's cost of preparing that opposition is not recoverable. [Doc 88 at 6.] But as Allied Industrial points out, its opposition was not due until April 12th. [Doc. 89 at 7 n.3.]